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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FragranceNet.com, Inc., Plaintiff, - against - FragranceX.com Inc. and John Does 1-20 Defendant.	CV 06 2225 (JFB) (AKT) **JOINT [PROPOSED] CASE MANAGEMENT AND SCHEDULING ORDER**

I. COURT CONFERENCE

There will be a conference in accordance with Fed. R. Civ. P. 16(b) before the Court on Monday, June 4, 2007 at 11:00 a.m. in Courtroom 910, United States Courthouse, Central Islip, New York. FragranceNet.com, Inc. ("FragranceNet") will appear by its attorneys Robert L. Sherman and Rebecca K. Myers of Paul, Hastings, Janofsky & Walker, LLP and FragranceX.com, Inc. ("FragranceX") will appear by its counsel David Rabinowitz of Moses & Singer, LLP. Pursuant to the Court's Initial Conference and Case Management Order, counsel for the parties have conferred to consider the nature and basis of their claims and defenses and the possibilities for

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a prompt settlement or resolution of the case, to arrange for disclosures required by Rule 26(a)(1), and to develop this Proposed Discovery Plan. The parties jointly submit this Proposed Case Management and Scheduling and request that the Court adopt it as the Case Management Order in this case.

II. BACKGROUND

The complaint that currently controls this litigation asserts a claim for copyright infringement. However, FragranceNet has moved for leave of the court to file a Third Amended Complaint adding claims for trademark infringement, trademark dilution, violation of New York General Business Law §133, state law dilution, injury to business reputation, common law unfair competition and misappropriation, passing off and unjust enrichment. FragranceNet's proposed new claims are based on its discovery that FragranceX is using FragranceNet's trademark in the metatags underlying its Web site and that FragranceX is purchasing keywords in Google's Adwords program with the full knowledge that they will cause defendant to appear as a "Sponsored Link" when a consumer types "fragrance net" or other variations of FragranceNet's mark into an Internet keyword search. FragranceX has opposed the motion on the ground that the proposed new claims are legally insufficient. If granted, the scope of discovery in this action will be expanded beyond what would be necessary to prosecute and defend the claims of copyright infringement. Judge Bianco has scheduled oral argument on FragranceNet's motion for June 4, 2007 at 9:30 a.m. During a pre-motion conference that was held telephonically with Judge Bianco and counsel for both parties on April 25, 2007, Judge Bianco indicated that he may be able to provide some guidance at oral argument as to how the parties should proceed with discovery while FragranceNet's motion to file its Third Amended Complaint is pending. Accordingly, the proposed Joint Discovery Plan is subject to any such guidance.

III. JOINT DISCOVERY PLAN

A. General Requirements

1. **Fed. R. Civ. P. 26(f)(1).** The parties will serve initial disclosures no later than June 4, 2007.

2. **Fed. R. Civ. P. 26(f)(2).** Subject to any guidance Judge Bianco may provide the parties at oral argument on FragranceNet's motion to file its Third Amended Complaint, the parties have agreed that fact discovery should be completed by April 25, 2008, expert discovery, including production of all expert reports and conclusion of all expert depositions, should be completed by August 8, 2008. FragranceNet has proposed that discovery will not be conducted in phases or be limited to or focused upon particular issues. FragranceX proposes that, as the parties are competitors, discovery be conducted on a bifurcated basis with discovery into parties' financial information, taking place only after an adjudication of liability discloses a need for such information. FragranceX anticipates making dispositive motions at the close of discovery on liability and proposes that such financial discovery take place after resolution of such motions. FragranceNet is strongly opposed to bifurcating discovery in this action.

3. **Fed. R. Civ. P. 26(f)(3).** Plaintiff's and defendant's discovery requests will include requests for electronically stored information and its corresponding metadata.

4. **Fed. R. Civ. P. 26(f)(4).** The parties have agreed to the entry of a Stipulation and Order Governing the Production of Documents and Information and respectfully request the Court to enter the agreement attached hereto as Exhibit A as an order of this Court.

5. **Fed. R. Civ. P. 26(f)(5).** Subject to any guidance Judge Bianco may provide the parties at oral argument on FragranceNet's motion to file its Third Amended Complaint, the parties have agreed that, without waiving their respective rights to make specific objections to discovery requests, no categorical limitations should be made on the discovery imposed under the Federal Rules of Civil Procedure, the local rules of this Court or otherwise, except that FragranceX proposes to exclude the discovery of internal financial information from discovery before an adjudication of liability makes such discovery relevant, as noted in paragraph III.A.2, above.

6. **Fed. R. Civ. P. 26(f)(6).** The parties are not requesting the Court to enter any orders under Rule 26(c) or 16(b) and (c) other than the Stipulation and Order Governing the production of Documents and Information as set forth in Paragraph III.A.4, above.

B. Deadlines and Court Appearances

FragranceNet's proposal:

Deadline for Completion of Initial Disclosures required by Rule 26(a)	June 4, 2007
First request for production of documents and first request for interrogatories due by:	July 11, 2007
Deadline for joinder of additional parties and amendment of pleadings:	September 6, 2007
Status Conference:	October 22, 2007
All fact discovery to be completed by:	April 25, 2008
Expert reports to be submitted by:	May 23, 2008
Rebuttal expert reports to be submitted by:	June 23, 2008
All expert discovery to be completed by:	August 8, 2008
Dispositive motion process started by:	September 8, 2008

Joint pretrial order due by:	October 8, 2008[1]
Pretrial Conference	October 15, 2008, at [TIME]

FragranceX's proposal:

Deadline for Completion of Initial Disclosures required by Rule 26(a)	June 4, 2007
First request for production of documents and first request for interrogatories due by:	July 11, 2007
Deadline for joinder of additional parties and amendment of pleadings:	September 6, 2007
Expert reports on liability issues to be submitted by:	September 21, 2007
Rebuttal expert reports on liability issues to be submitted by:	October 22, 2007
Expert depositions on liability issues to be completed by	December 7, 2007
Motions for summary adjudication of liability issues served by	December 21, 2007
Status Conference:	December 21, 2007
All fact discovery on damages to be completed by:	April 25, 2008 or sixty days after determination of motions for summary adjudication of liability, as applicable
Expert reports on damages to be submitted by:	May 23, 2008 or 4 weeks after completion of fact discovery on damages as

[1] Judge Bianco's Individual Practice Rule IV(A)(11) provides: In cases where a substantive motion (such as a motion for summary judgment) has been submitted to the Court, the pre-trial order shall be due within sixty days after the date of the decision issued by the court, unless otherwise directed by the Court.

	applicable
Rebuttal expert reports on damages to be submitted by:	June 23, 2008 or 4 weeks after service of expert reports on damages, as applicable
All expert discovery on damages to be completed by:	August 8, 2008 or 6 weeks after service of rebuttal expert reports, as applicable
Additional dispositive motions served by:	September 8, 2008 or 4 weeks after completion of expert discovery on damages, as applicable
Joint pretrial order due by:	October 8, 2008[2]
Pretrial Conference	October 15, 2008, at [TIME]

C. Other Discovery Matters

1. **Interrogatories**. The parties do not anticipate the need for the Court to increase the number of interrogatories and depositions beyond that allowed under the Federal Rules of Civil Procedure (25 interrogatories, including sub-parts, and 10 depositions). The parties have agreed that they will make their best efforts to accommodate the 7-hour rule prescribed by Federal Rule 30(d) but they may agree on a witness-by-witness basis to allow certain depositions to carry over to an additional date, and, if unable to agree, may petition the Court to extend any deposition.

[2] Judge Bianco's Individual Practice Rule IV(A)(11) provides: In cases where a substantive motion (such as a motion for summary judgment) has been submitted to the Court, the pre-trial order shall be due within sixty days after the date of the decision issued by the court, unless otherwise directed by the Court.

2. **Expert Witnesses.** Plaintiff potentially may have expert witnesses: for example, one on the issue of damages and one or more on the issues of likelihood of confusion, secondary meaning and originality. Defendant potentially may have expert witnesses: for example, on the issue of damages and one on the issues of secondary meaning, likelihood of confusion or originality. In the event that either party does not submit Expert Report(s), each party reserves its right to submit Rebuttal Expert Report(s).

3. **Sources of Discoverable Material Warranting Specific Planning.** Subject to any guidance Judge Bianco provides at oral argument on FragranceNet's motion to file its Third Amended Complaint, plaintiff intends to propound document requests that include requests for information concerning defendant's Web site development, product offerings, market research, advertising practices, and specifically, its communications with Google and other Web site search engine providers relating to its advertising. Similarly, defendant intends to propound discovery requests concerning inter alia plaintiff's Web site development, selection of tradename, market research, consumer surveys, trademark applications, and advertising practices including obtaining or creating pictures of products. Both parties respectfully request this Court to issue an order instructing both parties and their agents, employees and personnel to take affirmative steps to save, and refrain from deleting, all server-based, locally archived, PDA based and web-based mail and other electronic and hard copy documents relating to those topics and any other topics relevant to the issues of liability and that they not modify, add to, replace (due to failure or otherwise), overwrite, rotate, erase, delete, discard, destroy or otherwise perform any procedure or take any action that in any way alters, in whole or in part, any such electronically stored information.

4. **Subject Matter Limitations on Discovery.** Subject to any guidance Judge Bianco provides at oral argument on FragranceNet's motion to file its Third Amended Complaint, plaintiff anticipates that, given the nature of the allegations set forth in plaintiff's Proposed Third Amended Complaint, the scope of discovery in this action will be straightforward. Accordingly, plaintiff does not intend to request that the Court limit discovery to any particular subject matters or to employ any procedural mechanisms that will help to identify or narrow the issues in dispute. Defendant agrees, subject to its proposal to bifurcate discovery into liability and damages issues.

IV. DISCOVERY IN GENERAL

A. **Stays of discovery.** Discovery is not automatically stayed by the pendency of a dispositive motion, settlement discussions between the parties, a referral to mediation, or an agreement among the parties to suspend discovery.[3] A party seeking a stay of discovery must seek a court order and must show good cause why such relief should be granted.

B. **Written discovery.** Unless otherwise agreed to by the parties or so ordered by the court, responses to any request for written discovery pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure is due no later than 30 days after service of the request. All such requests and responses must conform to Local Civil Rules 26.3 (uniform definitions in discovery requests), 26.5 (cooperation among counsel in discovery), 26.6 (regarding attorney review of form discovery requests), and 26.7 (discovery requests to be read reasonably).

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[3] Judge Bianco's Individual Practice Rule IV(A)(11) provides: In cases where a substantive motion (such as a motion for summary judgment) has been submitted to the Court, the pre-trial order shall be due within sixty days after the date of the decision issued by the court, unless otherwise directed by the Court.

C. **Depositions.** Pursuant to Local Civil Rule 26.5, counsel are expected to cooperate with each other, consistent with the legitimate interests of their clients, in scheduling depositions. If counsel cannot agree on a schedule for a given deposition, the deponent must appear at the date, time, and place set forth in a notice properly served pursuant to Federal Rule of Civil Procedure 30 unless excused by the party that served the notice or by the court.

D. **Expert discovery.** Unless specific deadlines for expert discovery are set forth above, the deadline for completing all discovery includes all the production of all expert reports, including any rebuttal reports. The parties must ensure that they have completed underlying fact discovery, and that they have produced initial expert reports, in sufficient time for any rebuttal reports to have been served by the deadline. Unless otherwise ordered, or unless the parties agree to proceed otherwise, expert depositions may take place at any time before trial.

E. **Compliance with deadlines.** To be timely, a request for written discovery, deposition notice, or subpoena must be served in sufficient time for compliance to occur before the relevant deadline. I may decide not to enforce an untimely request, notice, or subpoena.

F. **Discovery disputes**. While parties must attempt in good faith to resolve discovery disputes in good faith before seeking judicial intervention, they must also ensure that any unresolved dispute is brought to my attention in sufficient time for the dispute to be resolved and discovery to be completed according to the deadlines in this schedule.

A motion to resolve a discovery dispute must be litigated pursuant to Local Civil Rules 37.3 and 6.4 and in accordance with my individual rules, which can be found at http://www.nyed.uscourts.gov/pub/rles/AKT-MLR.pdf. Motions that do not comply with all such requirements may not be accepted. Failure to submit a timely opposition in compliance with applicable rules may result in a motion being granted as unopposed.

V. STATUS CONFERENCE

Three business days before the scheduled date set forth above, the parties are directed to file a letter either reporting that discovery is proceeding on schedule and that there are no pending disputes requiring court intervention, or alternatively briefly describing the issues to be discussed at the conference. If warranted, I will cancel or adjourn the conference.

VI. DISPOSITIVE MOTIONS DEADLINE

The deadline for commencing dispositive motions is the date by which the first action must be taken to commence such a motion pursuant to the individual practices of the district judge to whom this case is assigned. As specified in the individual practice rules of the assigned district judge, that action will be either (a) submitting a letter requesting a pre-motion conference, (b) requesting an oral argument date from the district judge, (c) initiating the exchange of statements pursuant to Local Civil Rule 56.1, or (d) filing the notice of motion together with supporting papers. Each judge's individual rules can be found at www.nycd.uscourts.gov.

VII. SETTLEMENT TO BE DISCUSSED AT PRETRIAL CONFERENCE

No less than two business days before the pretrial conference, each party must submit by mail or fax (not by ECF) a one-page, *ex parte* statement of its settlement position. The statement must specify the terms on which the party is willing to settle the case, whether those terms are negotiable, and an explanation of that position. These statements will be treated as confidential, and will not be docketed, and should therefore include a realistic statement of the party's settlement position. Meaningful settlement discussions will occur at this conference; clients or other persons with full settlement authority must be present or immediately available by telephone.

VIII. MODIFICATIONS TO THE SCHEDULE

A. While the parties are encouraged to cooperate with each other in conducting discovery, they should not agree among themselves to any extensions that will render them unable to meet any deadline set forth above. **The deadlines in this order will be enforced, and will be modified only upon a timely showing of good cause.** The fact that a party intends to seek summary judgment, standing alone, will not be considered good cause to alter or suspend the deadline for filing a joint pretrial order (if one is required pursuant to the individual rules of the assigned district judge) or to postpone a discussion of settlement at the pretrial conference.

B. A request for an extension of any deadline submitted less than 30 days before that deadline will be considered untimely and will not be granted absent extraordinary circumstances.

C. A request for modification of any deadline in this scheduling order must be in writing, and submitted in accordance with my individual practice rules.

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IX. ELECTRONIC FILING AND CONTACT INFORMATION:

All filings must be submitted electronically pursuant to Administrative Order 2004-08. The lead attorney for each party must be registered with the Court's ECF system and must file a notice of appearance in this action so that he or she will be personally notified of all filings. The parties are under a continuing obligation to keep the Court apprised of any changes in their contact information, including mailing addresses, e-mail addresses, and daytime telephone numbers.

Dated: New York, New York
May 30, 2007

PAUL, HASTINGS, JANOFSKY & WALKER, LLP

By: [signature]
Robert L. Sherman (RS 5520)
Rebecca K. Myers (RM 8437)

Attorneys for Plaintiff FragranceNet.com, Inc.

MOSES & SINGER, LLP

By: [signature]
David Rabinowitz (DR 5205)

Attorneys for Defendant FragranceX.com, Inc.

SO ORDERED:

Dated: New York, New York
June ___, 2007

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HON. A. KATHLEEN TOMLINSON
United States Magistrate Judge